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No. 82-22

In The

Supreme Court of the United States

October Term, 1982

JAMES M. NAMEN, et al., and STATE OF MONTANA,
Petitioners,

vs.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al., and UNITED STATES OF AMERICA,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Rather than come to grips with *Montana v. United States,* 450 U.S. 544, reh. den. 452 U.S. 911 (1981), both Respondents attempt to slip its bonds by directing attention away from its basic holdings on the ownership issue. Thus, neither Respondent will concede that *Montana v. United States* requires that one must commence his interpretation of the Hellgate Treaty[1] with a strong presumption against conveyance of Flathead Lake prior to statehood or that to effectuate such a result required "clear" and "special" words. 450 U.S. at 552. Scant attention is paid to the fact that in the Treaty of Fort Laramie, 1868,[2]

[1]Treaty of Hellgate, July 16, 1855, 12 Stat. 975.

[2]Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649.

and subsequent legislation,[3] specific reference was made to the Yellowstone and Big Horn Rivers, yet this Court held that without appropriate language directed to the riverbed, the constitutional presumption would prevent alienation of navigable waters to any but the future state, despite the fact that the Crow Indian Reservation wholly embraced the Big Horn River. 450 U. S. at 554.

Respondents attempt to reduce *Montana v. United States* to an *ad hoc* decision only one year after it was rendered. They rely upon facts which are not dissimilar from those studied by this Court earlier.

Subsequent case law held and legislation intimated the Big Horn River was tribal territory.[4] However, the focus of this Court's attention was not post-treaty events but, rather, what did the treaty say? 450 U. S. at 554. Since the treaty *itself* did not "make the riverbed part of the conveyed land, especially when there was no express reference to the riverbed that might overcome the presumption against conveyance," there was in fact no conveyance. 450 U. S. at 554. The language in the Treaty of Hellgate is substantively indistinguishable.

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[3]Act of July 15, 1958, P.L. 85-523, 72 Stat. 351; Act of April 11, 1882, Chap. 74, 22 Stat. 42; Act of March 3, 1891, Chap. 543, 26 Stat. 981, 1039-40.

[4]*United States v. 5677.94 Acres of Land*, 152 F. Supp. 861, 863 (D. Mont., 1957); *United States v. 5677.94 Acres of Land*, 162 F. Supp. 108, 117 (D. Mont., 1958); *Crow Tribe of Indians v. United States*, Civ. No. 214 (D. Mont., 1963). Senate Report 700 (84th Cong., 1st Ses.) specifically stated that "the Yellowtail Dam and Reservoir will occupy Crow Indian lands and the Secretary should proceed, under whatever statutory authority may be available to him, immediately to secure the rights-of-way necessary for the dam, reservoir, appurtenances, and associated works." See also note 3, *supra*.

The Tribes' reliance on treaty minutes[5] fail to mention that in those minutes, there were two references to Flathead Lake, neither of which even intimated the Lake would be owned by the Tribes:

> "Governor Stevens. It provides for a reservation from the Jocko River *to the Flathead Lake,* and from the *Flathead River* to the mountains.
>
> • • •
>
> Alexander, Chief of the Flatheads. I think both sides of the Flathead River will be just enough.
>
> Gov. S. Are you through?
>
> Alexander. I will take from the Course de Femme on both sides of the river *to the lake.*" The Official Proceedings of the Council with the Flathead, Kootenai, and Upper Pend d'Oreille Indians Commencing July 7 and ending July 16, 1855 (National Archives Record Group No. 75, Treaty File No. 295, Item No. 1), pp. 35-36, 39. (Emphasis supplied.)

Although the Respondents attempt to create a public exigency (Tribes' Br., p. 12; U. S. Br., p. 12), it is patent that all tribal concerns would be nicely accommodated without violating the Equal Footing Doctrine. Thus, tribal fishing rights would survive without ownership (*United States v. Winnans,* 198 U. S. 371 (1905)); the Tribes would possess access to Flathead Lake without ownership (*Namen I,* 380 F. Supp. 452 (D. Mont., 1974), 534 F. 2d 1376 (9th Cir.) cert. den. 429 U. S. 929 (1976)); the Tribes would possess rights to lake water without ownership (*Winters v. United States,* 207 U. S. 564 (1908). Moreover, exclusive tribal fishing rights were clearly restricted to "streams" (Article III, App. F at 209), and surely, whatever rights they pos-

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[5]Tribes' brief at 11.

sessed in the lake fishery could be protected through equitable remedies. *Washington v. Fishing Vessel Ass'n.*, 443 U. S. 658, modified 444 U. S. 816 (1979).

Moreover, neither Respondent is willing to even discuss one of the central themes running through *Montana v. United States*, which has particular significance to Flathead Lake. The navigational easement specifically thrust upon Flathead Lake by a treaty[6] negotiated contemporaneously with the Hellgate Treaty and approved by Congress in advance of the Hellgate Treaty clearly brings into focus this Court's discussion of that fact as bearing upon the ownership issue. 450 U. S. at 555. Thus, the treaty language and contemporaneous events in this case—those facts which this Court held are determinative of the ownership issue—are indistinguishable from those studied in *Montana v. United States.*

The fact that lower courts, in cases in which the sovereign interests of Montana were not even represented, starting in 1942, said half of Flathead Lake is owned by the Tribes hardly distinguishes the instant situation from that involving the Crow, where on three occasions, lower courts held ownership of the Big Horn River was concededly the Crow Tribe's. See note 3, *supra.* Can Montana's right to equality be compromised when it didn't even have an opportunity to challenge earlier decisions?

The development of Flathead River power sites is identical to the situation that existed on the Crow Indian Reservation. Although the Tribes obtain some revenue based upon their alleged ownership of Flathead Lake,

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[6]Article 8, Treaty of the Upper Missouri, October 17, 1855, 11 Stat. 657 (App. G at 221).

clearly, the bulk of that revenue is dependent upon the sites themselves.[7] Furthermore, the issue of whether the Tribes would still be entitled to an unreduced amount of revenue despite lack of lake ownership is not an issue in this case.

Although Respondents argue that this case is unique and that there are no far-reaching principles involved, in fact, that same argument will be advanced as other tribes seek to divest Montana and her sister states of their navigable waters.[8] In *Montana v. United States,* this Court definitely held that the mere creation of an Indian reservation is insufficient to evade the force and effect of the Equal Footing Doctrine. The lower court's decision graphically illustrates that this basic holding requires further reinforcement, because without that reinforcement, the holding of this Court will surely be diluted to an *ad hoc* decision.

THE REGULATORY ISSUE

Both Respondents argue that existing rights will not be disturbed if the lower court's decision on the regulatory

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[7]*Montana Power Co. v. Federal Power Commission,* 459 F. 2d 863, 871-872 (D. C. Cir., 1974), cert. den. 408 U. S. 30 (1972). See also *Montana Power Co. v. F. P. C.,* 298 U. S. 335, 337 (D. C. Cir., 1962).

[8]See Amici Brief at 1-2 and note 26, Petition for Certiorari. Indeed, Respondents made similar arguments prior to this Court's review in *Montana v. United States.* Tribes Br. in Opposition, p. 8; United States' Br. in Opposition, p. 9. Unless this Court puts the question to rest, every tribe with like interests will surely try to distinguish the Crow situation from their own, when in fact, treaty language is substantially identical to that construed in *Montana v. United States.* At least one lower court did not have that difficulty. *Wisconsin v. Baker,* No. 76-C-359 (W. D. Wis., Oct. 23, 1981), 8 I. L. R. 3152.

issue stands. That is just not so! The Tribes' ordinance clearly states that existing structures are not immune. Sections 3 (b) and 5, Ordinance 64-A, Shoreline Protection Ordinance, App. N, pp. 274-275, 278-280.

Fees for existing docks and wharves are set by the tribal government. *Id.*, Section 5(b)(4), App. N at 279-280. Challenges to those fees are cognizable only in tribal forums, from which there is no appeal. Sections 8(c) and 10, App. N at 282-283. Confiscatory fees, fines, and penalties are clearly another method by which non-Indian rights can be confiscated. Token representation on the board is hardly a substitute for meaningful participation in tribal government or the right to full "Bill of Rights" protection. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 135, 153, 154 (1980).[9] This is not a case in which a non-Indian willingly succumbs to tribal jurisdiction by contract or entering into consensual relations. *Montana v. United States, supra*, 450 U. S. at 565. Here, a non-member is only attempting to exercise a property right granted to him by Congress free from tribal control.

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[9]The Tribes' inclusion of Corps of Engineers regulations (Tribes' App. 4a, *et seq.*) promulgated after the lower court's decision, which make reference to the Tribes' Shoreline Protection Ordinance, points up three reasons why tribal regulation should not be approved. First, the United States Corps of Engineers has obviously adopted comprehensive regulations. Second, the Corps' activities do fall within "Bill of Rights" protections. Third, the north half of the lake is subject to state and Corps regulation, while the south half would be subject to tribal and Corps regulation—a result which obviously could result in disparity of treatment.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be granted.

RESPECTFULLY SUBMITTED this 20th day of September, 1982.

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